United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

Original

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-1246

Decided March 8, 1976

UNITED STATES OF AMERICA,

Appellee,

-v-

CARL W. ANDERSON,

Defendant-Appellant.

PETITION FOR REHEARING

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Defendant-Appellant Carl W. Anderson moves pursuant to Rule 40 of the Federal Rules of Appellate Procedure for a rehearing of his appeal. The appeal was decided on March 8, 1976. Petitioner contends that the Court has overlooked the following points of law and fact:

I

The almost 5-year delay between the October 16, 1969 filing of Form X-17A-5 and the filing of the indictment on September 10, 1974 violated the Due Process Clause

of the Fifth Amendment under United States v. Marion, 404 U.S. 307 (1972) when in summation the Government exploited its delay by arguing to the jury that its witnesses' memories and appellant Anderson's witnesses' memories were vague because of the 5-year lapse.

Appellant showed unexplained governmental procrastination and unabashed governmental exploitation in its summation at trial to his prejudice (Appellant Brief pp. 10-11, 67-71, 77-8).

There could be no pre-trial motion under Marion, because: (1) there was no governmental utilization of its unexplained delay until its trial summation; and (2) there could be no showing of prejudice from the summation until the verdict. Accordingly, there was no waiver.

II

The Government's failure to call Peter Schmidt, Esq. as a witness before the Grand Jury violated the Due Process Clause of the Fifth Amendment as well as appellant's Fifth Amendment right to indictment by a Grand Jury. Mr. Schmidt's testimony directly contradicted Kilduff, the

Government witness without whom there concededly would have been no prosecution case (Appellant Brief, p. 80), and it exculpated Anderson. His testimony was not merely cumulative or an alternative to permissible hearsay already before the Grand Jury as in United States v. Koska, 443 F.2d 1167, 1169 (2d Cir.) (per curiam), cert. den., 404 U.S. 852 (1971), upon which this Court relied in affirming.

Moreover, in affirming, this Court stated that Mr. Schmidt's testimony "would have been, to a large extent, privileged". On the contrary, Kilduff, Mr. Schmidt's client, had waived all privilege when he testified in the Grand Jury on the very subject matter of the testimony the Government should have elicited from Mr. Schmidt before the Grand Jury (Appellant Brief p. 79 and the footnote at p. 79 continued through p. 81).

In addition, not knowing that Kilduff had already waived the attorney-client privilege when he testified in the Grand Jury about this very matter, Mr. Schmidt offered to testify provided his client Kilduff waived the privilege. The Assistant United States Attorney who presented the case to the Grand Jury did not inform Mr. Schmidt that Kilduff

had waived his attorney-client privilege and never called Mr. Schmidt as a witness, notwithstanding the explicit waiver resulting from Kilduff's Grand Jury testimony (Appellant Brief, p. 81 and the footnote at p. 81 continuted at p. 82).

The prosecutor should disclose to the Grand Jury any evidence which he knows will tend to negate guilt. ABA Standards Relating To The Prosecution Function And The Defense Function: The Prosecution Functior Section 3.6(b), at p. 88. The failure to do so is a Fifth Amendment violation of the right to indictment by a Grand Jury. With respect to the Due Process Clause, it is analogous to a violation under Brady v. Maryland, 373 U.S. 83 (1963). See also, Johnson v. Superior Court, 124 Cal. Rptr. 32, 539 P.2d 792 (Cal. Sup. Ct. 1975) (concurring opinion at 539 P.2d pp. 796-807).

III

There was no evidence that Anderson conspired to file a false report with the S.E.C. The proposition enunciated by the Court in footnote 3 of its Opinion, that the proof must be construed most favorably to the Government, deals with

conflicts with the credibility of the Government's evidence, and not with legal sufficiency of the evidence after it has been so construed. The issue here presented is whether the quantum of the Government's evidence is sufficient to support Anderson's conviction for conspiring to file a false report with the S.E.C.

A reasonable jury must be able to find the defendant guilty beyond a reasonable doubt as to each material element of the offense charged. See United States v. Taylor, 464 F.2d 240 (2d Cir. 1972). The Taylor test was not passed by the Government in its attempt to ascribe to Anderson knowledge of a "report to the S.E.C." The only such evidence in the entire record concerns the meeting of October 15, 1969, at which representatives of Haskins & Sells and Orvis reviewed the report.

The Trial Court accepted Anderson's testimony that he was unaware of the rule requiring the filing of the S.E.C. report, observing:

> ". . . Indeed, the verdict of acquittal on the substantive count may have been based on the jury's acceptance - at least to the extent of creating a reasonable doubt - of Anderson's testimony in this general regard. The charge on this count required a specific finding that the particular false filing had been within Anderson's reasonable contemplation." (App. 257a)

The jury's acquittal of Anderson on the substantive false filing count evidenced the inability of a reasonable jury to believe beyond a reasonable doubt that Anderson was in fact present when Form X-17A-5 was reviewed on October 15, 1969 by Sturgis, Taggart and Vayda of Haskins & Sells with representatives of Orvis.

Moreover, the evidence was insufficient as a matter of law to support a finding of Anderson's presence. The Government called Taggart and Vayda. Both testified that they along with Sturgis, the partner in charge, attended for Haskins & Sells. Taggart said that Sloan, Eucker and Kilduff represented Orvis. Vayda also named Sloan, Eucker and Kilduff, but he could not say Anderson was present ("it could possibly be that it could have been [also] Mr. Villani or Mr. Anderson" (1362-3)).

The Government did not call Sturgis, the partner in charge for Haskins & Sells -- the defense did. Sturgis had listed the Orvis participants -- Sloan, Eucker and Kilduff -- in his diary, Ex. BO. <u>These same Orvis participants were listed in Gov. Ex. 74B</u>, the extract from Sturgis' diary prepared for the Government during its investigation.

Only Kilduff placed Anderson at the meeting -- and he got one of the Haskins & Sells participants wrong too, omitting Taggart and erroneously replacing him with Petrillo. (See Appellant Brief, pp. 25-6 and Appellant Reply Brief, pp. 15-17.)

Finally, Form X-17A-5 itself was sent by Haskins & Sells to the S.E.C. and to the New York Stock Exchange with separate transmittal letters. Form X-17A-5 itself contains no reference to the S.E.C. (See Ex. BP).

IV

The most important allegedly false statement in the report was that the customers' securities pledged in error had been since corrected. The Government does not contend that Anderson was aware of the allegedly improper hypothecation before the report was filed with the S.E.C.

While this Court correctly observes that Anderson would be responsible if illegal hypothecation was within the scope of the conspiracy, the proof was to the contrary. There was simply no evidence that Anderson was party to such an agreement, United States v. Borelli, 336 F.2d 376, 384, 385 (2d Cir. 1964). Kilduff never discussed hypothecation with Anderson or any other Orvis personnel

(417). Indeed, the Court dismissed Count 9 because it was "not within the contemplation . . . of the conspiracy. There is no evidence that he [Anderson] hypothecated" (2310-11).

Moreover, the allegation was not that there had been "corrected" the pledging of all customers' securities, but only those that had been "pledged in error" -- that is, those that had been pledged in violation of Rule 8c-1 (17 C.F.R. 240.8c-1).

It was only subdivision (a)(3) of the rule that the Government invoked in the indictment* and at trial. Nothing was said in the indictment or at trial about the commingling provisions of subdivisions (1) or (2). There was no proof at trial that the securities of any named customer were commingled in violation of either subdivision.

Indeed, when Anderson sought a bill of particulars with respect to hypothecation (Items 4a and 12 with respect to Count 1 (conspiracy), and Item 16 with respect to Count 9 (the substantive hypothecations)), the Government, referring Anderson to its answers to Sloan's requests, refused any particulars which would name any customer, arguing its lack of materiality.

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*by tracking in part the language of that subdivision

Anderson's Item 4a reads:

"(a) the hypothecation of fully paid for securities carried for the account of customers of Orvis, specifying the securities involved, the customers for whose account each of these securities were carried, and the times when and places where such securities were hypothecated or subjected to liens and claims of pledgees (Count One, Paragraph 2)."

Anderson's Item 12 reads:

"State how, when, where and to whom the defendant Anderson expressed his consent to the action of the defendant Eucker set forth in Count One, Paragraph 7(h), specifying for each hypothecation referred to therein: The date of the hypothecation; the names, number of shares and total value of the securities hypothecated; the customer for whom such securities were held by Orvis; the bank or other entity where the securities were hypothecated; and the loan or loans obtained by Orvis in connection with each such hypothecation.

Anderson's Item 16 reads:

"Set forth the dates of each hypothecation, specifying for each such date the securities hypothecated, including the number of shares and dollar value, the customers whose securities they were, the places where such securities were hypothecated, and the loans obtained by Orvis in connection with such hypothecation."

The Government's opposition to Anderson's requests numbered 4a and 12 refer Anderson to its answer to Sloan in its Items 6, 7, 8 and 33, which read as follows:

"(6) The defendant participated in the hypothecation of securities during the approximate

period, August 1, 1969 to June of 1970. This hypothecation occurred at the office of Orvis Brothers, 30 Broad Street, New York, New York. As of August 31, 1969, the amount of the hypothecation was approximately $5,965,146 (Pledged in error to banks) and $1,517,205 (Loaned in error primarily to brokers). The Government opposes providing the defendant with the specific names and amounts of each security hypothecated on the ground that such information is completely irrelevant and bereft of materiality, and because the securities hypothecated were segregated by bulk only and not according to individual customers."

"(7) Opposed. See (6) above."

"(8) As to the time of the hypothecation, see (6) above. As to whom the securities were pledged, and the nature thereof, the Government opposes the request as irrelevant and bereft of materiality."

"(33) Orvis Brothers, 30 Broad Street, September 1, 1968 - June, 1970. The Government opposes the remainder as seeking the Government's evidence and the theory of its case."

In opposing Anderson's Item 16 the Government said:

"Approximately October and November of 1969 at Orvis Brothers, 30 Broad Street. The remainer is opposed as seeking the Government's evidence and the names of prospective Government witnesses."

The teaching of Russell v. United States, 369 U.S. 749, 765 (1962) is that an indictment may not merely track the language of the statute, but it must descend to particulars.

"it is not sufficient to set forth the offence in the words of the statute, unless those words of

> themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . . Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged."

Here the indictment only set out in part the language of subdivision (a)(3) of Rule 8c-1 -- which it now disclaims. A fortiori, under Russell it cannot rely on its mere recital in the indictment of the statutory and rule references, 15 U.S.C. §78h and 17 C.F.R. 240.8c-1, to contend for the first time on appeal that it proved an unspecified commingling under another subdivision.

In sum, there was no proof that Rule 8c-1 (a)(3) was violated, and Anderson was barred from showing it was not. Therefore, there was no proof by the Government that the customers' securities erroneously pledged had not been corrected by October 16, 1969. Moreover, commingling violations, if any, may not support a conviction under Russell. Finally, the hypothecation subdivision in issue, Rule 8c-1(a)(3), permits far more extensive hypothecation

than 15 U.S.C. 78h(c), the section authorizing the rule-making by the S.E.C. (Appellant Brief, pp. 48-51).

V

A prison sentence may be imposed for the violation of §78ff(a) arising from the false filing with the S.E.C. of a report expressly required by "this chapter". Examples of reports expressly required by statute (as opposed to S.E.C. rule or regulation), where only the form of the reports are left to the S.E.C., are: current and annual reports, required of certain publicly-held corporations by Section 13(a) of the 1934 Act (15 U.S.C. §78m(a)); and reports of transactions in the securities of certain publicly-held corporations by its "insiders", required by Section 16(a) of the 1934 Act (15 U.S.C. §78p(a)). See, e.g., United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. den., 406 U.S. 917 (1972), which involved, inter alia, convictions for filing false current and annual reports.

On the other hand, where the conviction under 15 U.S.C. §78ff(a) arises from the filing with the S.E.C. of a

report nowhere referred to in the 1934 Act, but required only by a rule or regulation promulgated by the S.E.C. pursuant to authority delegated by Congress, then the "no knowledge" proviso is applicable, and a prison sentence may not be imposed when the defendant had no knowledge of the applicable rule or regulation.

In Anderson's case the report (Form X-17A-5) is required only by Rule 17a-5, 17 C.F.R. §240.17a-5, and is nowhere mentioned in the statute. Indeed, in pertinent part the indictment charged a conspiracy to file a false report with the S.E.C., "in contravention of Rule 17a-5 (17 C.F.R. Section 240.17a-5)" (App. 25a). The Court found Anderson had no knowledge of the rule (App. 256a-257a). Accordingly, the prison sentence was illegal.

No reported case has been found authorizing imprisonment for a false S.E.C. report required by a rule of which a defendant was ignorant. In construing a criminal statute any ambiguity should be resolved in favor of lenity. United States v. Bass, 404 U.S. 336, 347 (1971).

Respectfully submitted,
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